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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2010 AUG 25 A 11:41

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:

MARK W. BOSWORTH and LISA A.
BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE
V. VAN CAMPEN, husband and wife;

MICHAEL J. SARGENT and PEGGY L.
SARGENT, husband and wife;

ROBERT BORNHOLDT and JANE DOE
BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES,
L.L.C., an Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS,
L.L.C., an Arizona limited liability company;

Respondents.

DOCKET NO. S-20600A-08-0340

**SECURITIES DIVISION'S RESPONSE TO
MOTION FOR PROTECTIVE ORDER**

AND

MOTION TO STRIKE

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission

DOCKETED

AUG 25 2010

DOCKETED BY

The Securities Division of the Arizona Corporation Commission ("Commission") requests denial of the Motion for a Protective Order filed by Respondents Michael J. Sargent and Peggy L. Sargent (collectively the "Sargents") because:

1. Neither the Securities Act of Arizona nor the Arizona Administrative Code authorize an order precluding an agency from enforcing the laws administered by that agency.

2. The Commission has no authority to offer immunity to a witness in an administrative matter.

3. The Securities Division has not threatened any retaliatory action against Ms. Broyles if she testifies in this administrative proceeding.

4. The Sargents are not precluded from calling Ms. Broyles to testify. Neither the Sargents nor Sargents counsel have the authority to seek a remedy for Ms. Broyles.

In addition to denial of the motion, absent an opportunity to cross examine Ms. Broyles, the Securities Division requests that paragraphs 6 through 14 of the Affidavit of Barbara Broyles be stricken from the record.

I.
NEITHER THE SECURITIES ACT OF ARIZONA NOR THE ARIZONA
ADMINISTRATIVE CODE AUTHORIZE AN ORDER PRECLUDING
AN AGENCY FROM ENFORCING THE LAWS
ADMINISTERED BY THAT AGENCY

A.R.S. § 44-2032 authorizes the Commission, *in its discretion*, to take specified actions “if it appears to the Commission that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the Commission under this chapter.” A.R.S. § 44-1811 directs the Commission to appoint a director of securities to administer the Securities Division “subject to the authority and under the supervision of the Commission.” A.A.C. R14-3-109(A) provides that hearings may be held “before one or more Commissioners, one or more Hearing Officers, or any combination thereof.” The presiding officer of a hearing may adjourn or recess a hearing to submit a recommendation to the Commission to dismiss a proceeding (A.A.C. R14-3-109(C)), consolidate two or more proceedings in one hearing (A.A.C. R14-3-109(H)), limit the number of witnesses or time for testimony (A.A.C. R14-3-109(I)), quash subpoenas (A.A.C. R14-3-109(O)), continue proceedings (A.A.C. R14-3-109(Q), etc. *See also* A.R.S. § 41-1062. As is apparent from the dearth of authority cited by Sargents and their skilled counsel in their motion, no law authorizes a presiding officer to “protect” any person from the administration of the Securities Act by the Securities Division or to prohibit the Securities Division from bringing a matter before the Commission for a determination by the Commission.

II.

THE COMMISSION HAS NO AUTHORITY TO OFFER IMMUNITY
TO A WITNESS IN AN ADMINISTRATIVE MATTER

Under A.R.S. § 41-1066(B), an agency has the authority to compel testimony after an assertion of the privilege against self-incrimination only with the prior written approval of the attorney general. Section 41-1066 allows the attorney general to determine if gaining the witness' testimony in an administrative proceeding outweighs the potential loss of a criminal prosecution of the witness. *Cf. Pillsbury Co. v. Convoy*, 459 U.S. 248, 261, 103 S. Ct. 608, 616 (1983).

In this instance, the witness is not asserting a fifth amendment privilege. In fact, the Sargents' Counsel are attempting to duplicitously introduce direct testimony without allowing the Securities Division to conduct cross-examination before the tribunal through an affidavit attached to the Sargents' motion. Essentially, what the Sargents are telling this tribunal is that Ms. Broyles will repeat her affidavit in person and on the stand, subject to cross-examination, only if the presiding officer tells the Securities Division that it cannot bring an action against Ms. Broyles for her violations of the Securities Act.

III.

THE SECURITIES DIVISION HAS NOT THREATENED ANY RETALIATORY
ACTION AGAINST MS. BROYLES IF SHE TESTIFIES IN THIS
ADMINISTRATIVE PROCEEDING.

Notably lacking in Sargents' motion and Ms. Broyles' affidavit are any facts regarding the Securities Division's purported threat against Ms. Broyles. In fact, Ms. Broyles swears that "at no time did the Securities Division ever indicate that I was a 'target' of their investigation, or that they might pursue charges against me." Affidavit, page 2, lines 6 and 7. Ms. Broyles does not state from whom she purportedly learned "that the Securities Division may pursue charges against me if I testify." Affidavit, page 2, lines 7 and 8.

The Sargents apparently want this tribunal to believe that if Ms. Broyles testifies, the Securities Division cannot show that Michael Sargent violated the Securities Act. Hence, the Securities Division has a nefarious motive for threatening to bring an action against Ms. Broyles. However, Ms. Broyles' testimony does not negate the Securities Division's evidence against

1 Michael Sargent. According to Ms. Broyles, Michael Sargent "would speak for perhaps three
2 minutes" at sales seminars and "was not at the sales tables." Affidavit, page 3, lines 2 and 3.
3 Unfortunately for Michael Sargent, any untrue or misleading statement made *in connection with a*
4 transaction within or from Arizona *involving* an offer to sell or buy securities violates A.R.S. § 44-
5 1991 -- whether said statement was made in three hours or three seconds, while standing, sitting, or
6 walking inside or out.

7 If Ms. Broyles' testimony incriminates her, the Securities Division would not be acting
8 contrary to law to bring the violation to the attention of the Commission. The Securities Division
9 has no incentive to threaten an administrative action to preclude her testimony. Absent an
10 opportunity to cross examine Ms. Broyles, however, the Securities Division requests that the
11 testimony contained in Ms. Broyles' affidavit be stricken from the record.

12 IV.

13 THE SARGENTS ARE NOT PRECLUDED FROM CALLING MS. BROYLES
14 TO TESTIFY. NEITHER THE SARGENTS NOR THE SARGENTS'
15 COUNSEL HAVE THE AUTHORITY TO SEEK A REMEDY ON MS.
16 BROYLES' BEHALF

17 The posture of this motion defeats logic. Who is seeking what remedy? The Sargents
18 allege they are seeking an order to protect Ms. Broyles so "Mr. Sargent's ability to present
19 witnesses in his defense should not be impeded." In fact, the Securities Division is not impeding
20 Michael Sargent's ability to present a witness -- if anyone is creating an impediment, it is the
21 witness. See Affidavit of Barbara Broyles, page 2, lines 2 and 3 ("I will not testify without a grant
22 of immunity, but I am willing to testify if immunity is granted."). The alleged injury—the
23 incrimination of Ms. Broyles through her testimony -- would be that of Ms. Broyles. *Cf. Bennett v.*
24 *Napolitano*, 206 Ariz. 520, 524, 81 P.3d 311, 314 (2003) (persons seeking redress must establish
25 personal injury to themselves). Is in fact Ms. Broyles seeking immunity, which the Commission
26 cannot grant? If Ms. Broyles is seeking a way to protect herself, she should appear on behalf of
herself or through counsel. Neither the Sargents nor their counsel have the authority to represent
Ms. Broyles' legal interests in this forum. *Cf.* 17A A.R.S. Sup. Ct. Rules, Rule 31(b).

V.
CONCLUSION

The Securities Division has made no threat to bring an action against Ms. Broyles if she testifies in this matter. It has no incentive to make such a threat. The Sargents have no standing to seek protection or immunity for a third party; the presiding officer has no authority to order the Securities Division to give Ms. Broyles immunity; the Securities Division has no authority to grant immunity, the presiding officer has no authority to prohibit the Securities Division from bringing a lawful action. The Sargents' motion has no basis in fact or law and the Securities Division requests that it be denied. Absent an opportunity to cross examine Ms. Broyles, the Securities Division requests that the testimony contained in her affidavit be stricken from the record.

RESPECTFULLY SUBMITTED this 25th day of August 2010.

SECURITIES DIVISION of the
ARIZONA CORPORATION COMMISSION



Julie A. Coleman
Chief Counsel of Enforcement

ORIGINAL and **8 COPIES** of the foregoing filed
this 25th day of August 2010 with:

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COPY of the foregoing delivered
this 25th day of August 2010 to:

The Honorable Marc E. Stern
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